Supreme Court, U.S.
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No. 01-1444

In the Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

Ben Chavez encountered Oliverio Martinez under truly exigent circumstances. In the aftermath of a tragic struggle with two patrol officers, with Martinez apparently clinging to life, petitioner sought – as respondent now concedes (Br. 10) – "to find the truth" and to determine "if [a] crime had been committed." C.A. App. 98-99; J.A. 20-22. Chavez did not have the luxury of time: Respondent told him no fewer than eight times that "he believed he was dying" (Pet. App. 21a); if the officer was going to obtain a statement from this crucial witness, it was now or never. So Chavez interviewed respondent for about ten minutes, spread out over a 45-minute interval to permit emergency room personnel to attend to respondent's injuries. Pet. App. 4a; C.A. App. 451. The interview did not interfere with Martinez's medical treatment, nor – as the district court agreed (Pet. App. 28a) – did Chavez inflict additional pain on an already gravely wounded patient. And, although Martinez strongly incriminated himself in response to petitioner's questions – admitting that he had "pulled" one of the officer's guns and had "pointed" it at the officer (J.A. 11, 15-17) – none of respondent's statements was ever used against him in a criminal case.

As we showed in our opening brief, on these facts petitioner was entitled to qualified immunity. The Fifth Amendment's Compulsory Self-Incrimination Clause cannot be violated without a "use" of compelled testimony against the declarant in a "criminal case" – and no such use has been made of Martinez's statements. The substantive due process protections of the Fourteenth Amendment (although not the fair trial right) *may* be violated by certain extreme forms of coercion, but only in limited circumstances not present here. That right is implicated only by (i) the invasion of a protectible liberty or property interest, with (ii) an intent to harm the victim, and (iii) a cost to the victim that outweighs the public purpose of the interrogation. None of those factors – much less all of them – is present in this case. Finally, even if a Fifth or Fourteenth Amendment right could be established on these facts, at the time of the interrogation neither right was "clearly established"

in the "particularized, and hence more relevant, sense: The contours of the right[s]" were not "sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (emphasis added).

Respondent and his amici do not take serious issue with any of these propositions. Indeed, respondent's brief rests largely on a series of misconceptions – about the facts, about the law, and about the nature of our arguments.

First the facts: Respondent has taken some surprising liberties with the record. For example, in an apparent effort to downplay his own role in the police shooting, respondent asserts (Br. 2) that Officer Peña "observed that Martinez was not trying to cause injury to Salinas, nor 'trying to fight meaning causing injury to officer Salinas.'" But the testimony cited for this assertion concerned a separate incident involving Officers Salinas and Peña and another suspect a full week before the encounter with respondent. See C.A. App. 188-190. In other places, respondent's account is merely misleading. Salinas may not have "see[n] the knife" when he was conducting the pat down of Martinez (Resp. Br. 2), but he felt it (C.A. App. 200) and "also noticed that there was a large bulge protruding out of [respondent's] right side waistband" (C.A. App. 216). Salinas "never saw Martinez point the gun at Peña" (Resp. Br. 3), but he *did* see it pointed at himself (C.A. App. 69), and *Peña* saw it pointed at her twice and at Salinas at least four times (C.A. App. 185). Respondent intimates (Br. 6) that the district court found that petitioner had caused respondent additional pain, but the court in fact said the opposite, observing that respondent's pain and suffering had been received only at the scene of the shooting. Pet. App. 28a.[1]

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[1] In yet other places respondent makes claims about the evidence where the record is simply silent. The most egregious is the assertion, twice repeated, that the district court based its ruling, in part, on "the audiotape of the interrogation in the emergency room of the hospital." Br. 9. See also Br. 41 ("The actual tape recording is the best evidence of the circumstances Chavez witnessed."). In point of fact, the tape was never placed into the record below, so far as the docket sheet and other documentation reveal. And there is absolutely no reason to suppose that either the district court or the court of appeals ever saw, much less listened to, the tape recording. The district court cited a "police follow-up report," not any tape recording, for its observation that Martinez "was yelling in pain" (Pet. App. 21a); and the court of appeals observed that "[t]he *transcript* of the recorded conversation * * * provides an incontrovertible account of the interview" (Pet. App. 4a (emphasis added)). Indeed, it is precisely because the tape was *not* made part of the record below that respondent has now seen fit to lodge a copy of the tape with this Court. See Respondent's Notice of Lodging of the Tape Recording of Ben Chavez's Interview of Oliverio Martinez. Although respondent invokes Sup. Ct. Rule 32.1 in support of the lodging, the tape recording, so far as we can tell, was *not* "material forming part of the evidence taken in [the] case." This eleventh-hour attempt to supplement the record takes undue advantage of the lodging privilege. See R. STERN, E. GRESSMAN, S. SHAPIRO, & K. GELLER, SUPREME COURT PRACTICE 651-52 (8th ed. 2002) ("Even though there is no reference to this practice in the Court's rules, 'any lawyer can lodge documents with the Court *as long as the material qualifies as the kind of background the Justices could take judicial notice of and refer to in their opinions as generally known facts*'") (quoting former Deputy Clerk Francis Lorson, as in turn quoted in L. CAPLAN, THE TENTH JUSTICE – THE SOLICITOR GENERAL AND THE RULE OF LAW 22 n.17 (1987) (emphasis added)); see also Clerk's Comment to Proposed S. Ct. R. 32.3 (issued Nov. 18, 2002, proposed effective date Jan. 2, 2003) ("parties and *amici curiae* have deluged the Court with * * * cassette tapes").

Most fundamentally, however, respondent misconstrues the Fifth and Fourteenth Amendments and cannot possibly show that his understanding of those amendments – even if right – was clearly established at the time of the interrogation. Petitioner is therefore entitled to qualified immunity.

1. Respondent's Fifth Amendment Rights Were Not Violated

Respondent mischaracterizes our argument about the scope of the Fifth Amendment. We do *not* contend that the Fifth

Amendment is violated only when compelled testimony is used against the declarant *at trial*. The plain language of the Compulsory Self-Incrimination Clause prohibits the use of compelled testimony "in a criminal case" – as we repeatedly stated in our opening brief. See, *e.g.*, Pet. Br. 13, 15, 17, 19, 21. Respondent's statements, however, were never "used" in a "criminal case"; indeed, they were never "used" at all.

Respondent also misreads our argument when he labors to show that the Compulsory Self-Incrimination Clause "applies" in a variety of settings *other* than criminal cases, including "in custodial settings, civil litigation, [and] administrative and legislative proceedings." Resp. Br. 12. Again, we agree, and said just that. Pet. Br. 13. But although the Fifth Amendment *applies* – that is, it may be *invoked* – outside the criminal case itself, it is not until there is an actual *use* of the compelled statement "in a criminal case" that the Fifth Amendment has been breached. That is what this Court's case law confirms in a variety of settings.

The so-called "penalty cases" – which respondent and his amici cite as contrary authority (Resp. Br. 20; Nat'l Police Accountability Proj. Br. 5-6) – are entirely consistent with our reading of the Fifth Amendment. In this line of cases, some governmental authority sought either to coerce testimony or to compel a waiver of immunity from use in a criminal prosecution by threatening the loss of employment or of some similar benefit. The lesson of these cases is that the government cannot *both* compel incriminating testimony (through the coercive effect of penalties) *and* at the same time hold open the possibility of a subsequent prosecution without use immunity. As the Court summarized the point in *Lefkowitz* v. *Turley*, 414 U.S. 70, 84-85 (1973) (emphasis added):

> [G]iven adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment. * * * But the State may not insist that appellees waive their Fifth Amendment privilege against

> self-incrimination *and consent to the use of the fruits of the interrogation in any later proceedings brought against them*. Rather, the State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence. *Hence, if answers are to be required in such circumstances States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.*

As the Court explained in its most recent "penalty case" ruling: "If the State of Kansas offered immunity, the self-incrimination privilege would not be implicated." *McKune* v. *Lile*, 122 S. Ct. 2017, 2025 (2002).

It follows, from the "penalty cases" and the other authorities we have discussed, that the Ninth Circuit *cannot* be right when it says that coercion alone is enough to violate the right against compulsory self-incrimination. Were that the rule, a grant of immunity would *not* permit the government to compel incriminating testimony. This Court's immunity case law, its "penalty cases," and its more recent "foreign prosecution" decision in *United States* v. *Balsys*, 524 U.S. 666 (1998), would all be a dead letter.

Respondent insists, however, that "numerous courts of appeal[s] have held that the Fifth Amendment is violated at the time of the coercion and that the coerced statement need not be introduced at the individual's criminal trial before the Amendment is violated." Br. 25-26. To reiterate: We do not argue that only use *at trial* constitutes a violation; use at any stage of a "criminal case" plainly suffices. See *United States* v. *Hubbell*, 530 U.S. 27, 41 (2000) (making "derivative use" of compelled testimony "in obtaining the indictment against respondent and in preparing its case for trial" constitutes Fifth Amendment violation). Other than the Ninth Circuit, however, no court of appeals (to our knowledge) has held that the Fifth Amendment's Compulsory Self-Incrimination Clause can be violated merely by coercing an incriminating statement from a witness,

without any subsequent use in a criminal case. Certainly none of the cases cited by respondent (Br. 26-27) does so. See, *e.g.*, *United States* v. *North*, 920 F.2d 940 (D.C. Cir. 1990) (holding that a *Kastigar* hearing was required to determine whether the government "used" defendant's immunized testimony "in a criminal case" by exposing one or more witnesses to the testimony); *Clanton* v. *Cooper*, 129 F.3d 1147 (10th Cir. 1997) (coerced statement "used" to effect witness's arrest); *Wilson* v. *Lawrence County*, 260 F.3d 946 (8th Cir. 2001) (coerced confession "used" because, once trial court declined to suppress it, witness entered a guilty plea in order to avoid the death penalty). Compare also *Gray* v. *Spillman*, 925 F.2d 90 (4th Cir. 1991) (cited by respondent but not reaching the issue), with *Wiley* v. *Doory*, 14 F.3d 993, 996 (4th Cir. 1994) (Powell, J., sitting by designation) (sustaining a defense of qualified immunity in a Section 1983 case founded on a Fifth Amendment claim and noting that the dissenters in *Cooper* v. *Dupnik*, 963 F.2d 1220 (9th Cir.) (en banc), cert. denied, 506 U.S. 953 (1992), made "persuasive arguments that the privilege against self-incrimination is not violated until the evidence is admitted in a criminal case"), and *Riley* v. *Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997) (en banc) (rejecting Fifth Amendment claim, noting that, "[w]hile Fifth Amendment concerns can certainly be implicated prior to trial, the Supreme Court has declared that a Fifth Amendment violation occurs only when self-incriminating statements are introduced at trial, thereby compelling the defendant to 'become a witness against himself'").

Finally, respondent and his amici caution that embracing (actually, reiterating) this fundamental limitation on the scope of the Compulsory Self-Incrimination Clause will prompt police officers to ignore the dictates of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and – more darkly – to "'use brute force and torture to extract an involuntary confession from a suspect.'" Resp. Br. 29, 39. See also ACLU Br. 10-20. This parade of horribles is in fact a parade of red herrings. There is no reason in this case to address the question whether a deliberate violation of *Miranda* could ever give rise to a Section 1983 claim; the lower

courts did not address the issue, and the issue is not included within the question presented. It may be added, however, that were police officers to engage in a deliberate pattern and practice of violating *Miranda* – especially if their interrogation methods involved "brute force and torture" (Resp. Br. 29) – the Due Process Clauses of the Fifth and Fourteenth Amendments would be available as a potential safeguard, even though the Compulsory Self-Incrimination Clause would not be.[2]

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[2] In light of *Miranda*'s rooting in the Fifth Amendment, see *Dickerson* v. *United States*, 530 U.S. 428, 435 (2000), it is hard to see how a *Miranda* violation that does not result in an actual *use* of the witness's statement in a criminal case could give rise to a claim under Section 1983. If it could, *Miranda* would be more than just "a constitutional rule" (530 U.S. at 437) and more than just a prophylactic protection to reduce the risk of undetected constitutional violations – it would afford protections of a sort the Fifth Amendment does not speak to at all, namely protections for one *not* ever involved in "any criminal case," U.S. CONST. Amend. V. As Justice Marshall explained in *New York* v. *Quarles*, 467 U.S. 649, 686 (1984) (dissent):

> If a bomb is about to explode or the public is otherwise imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda* v. *Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.

See also *id.* at 664 (O'Connor, J., concurring in part and dissenting in part) ("*Miranda* has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered * * *.").

2. Respondent's Due Process Rights Were Not Violated

As we explained in our opening brief (at 21-27), the Due Process Clause affords at least two distinct protections to individuals subjected to coercive interrogation. The first protection – reflected in decisions such as *Brown* v. *Mississippi*, 297 U.S. 278 (1936), as well as *every* authority on which the Ninth Circuit relied both here and in *Cooper* for the proposition that coercive interrogation alone violates the Fourteenth Amendment (see Pet. App. 7a-8a, 10a-11a; 963 F.2d at 1244-1249) – ensures that individuals will not be convicted on the basis of an involuntary confession. This "fair trial" right is distinct from the substantive due process right not to be subjected to police tactics that "shock the conscience." Such extreme conduct may run afoul of the Due Process Clause even when it does not result in a statement that is later offered at trial. See *Wilkins* v. *May*, 872 F.2d 190, 195 (7th Cir. 1989), cert. denied, 493 U.S. 1026 (1990); *United States* v. *Kelly*, 707 F.2d 1460, 1476 n.13 (D.C. Cir.), cert. denied, 464 U.S. 908 (1983).

The Ninth Circuit's cardinal error was conflating these two distinct protections. It supposed that any police interrogation that results in an "involuntary" statement for purposes of the "fair trial" right must likewise give rise to a substantive due process claim *even when the resulting statement is not used against the witness*. That is simply not so, as the hypothetical example outlined in our opening brief (at 26-27) illustrates. Respondent now makes the same mistake. He argues that "constitutional violations occur when the coercion happens" (Br. 32) – a proposition we do not dispute if, but only if, we are talking about coercion that truly shocks the conscience.[3]

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[3] Mimicking the Ninth Circuit's confusion, respondent intermingles both "fair trial" and substantive due process cases in the string cites purportedly showing that mere coercion suffices to state a due process violation. See Br. 32 n.18. In several of these cases, the government in fact used the coerced statement at trial or in related proceedings. See, *e.g.*, *Duncan* v. *Nelson*, 466 F.2d 939 (7th Cir. 1972) (coerced confession admitted into evidence, resulting in conviction and imprisonment); *Wilson* v. *Lawrence County*, 260 F.3d 946 (8th Cir. 2001) (confession held to be admissible, resulting in guilty plea designed to avoid death penalty); *Weaver* v. *Brenner*, 40 F.3d 527 (2d Cir. 1994) (confession used to obtain grand jury indictment).

Coercion alone, however, is insufficient, even if it results in an "involuntary" statement, unless the coercive conduct reaches "shocks the conscience" proportions.

Of course, even a "shocks the conscience" finding may not be enough. Substantive due process analysis – like any other inquiry under the Due Process Clause – "must begin with a careful description of the asserted right." *Reno* v. *Flores*, 507 U.S. 292, 302 (1993). Respondent never tells us in what respect his liberty or property was infringed by petitioner's interrogation. There is no evidence that the questioning caused Martinez pain; the district court found that it did not. Pet. App. 28a. There is no evidence that the interrogation interfered with respondent's medical treatment – and respondent does not argue otherwise. And as we explained in our opening brief, not only is there no right, "deeply rooted in this Nation's history and tradition" (*Bowers* v. *Hardwick*, 478 U.S. 186, 192 (1986)), to be free of police questioning, but quite the contrary is true. "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Miranda* v. *Arizona*, 384 U.S. 436, 477-478 (1966). The duty to assist law enforcement – not the right to avoid questioning – is a "deeply rooted social obligation." *Roberts* v. *United States*, 445 U.S. 552, 558 (1980).

In the absence of a cognizable liberty or property interest, the Due Process Clause – substantive or otherwise – cannot be violated. As we noted in our opening brief (at 31-36), however, that is just one of several difficulties with respondent's substantive due process claim in this case. Under *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), Chavez cannot be liable under the Due Process Clause unless he acted with the intent to harm Martinez. Respondent makes no such claim, and there is no such evidence. Instead, respondent and his amici

(Resp. Br. 35-36; ACLU Br. 24-29) urge that a lower standard – "deliberate indifference" – should suffice to state a substantive due process claim in this case. In respondent's view, "Chavez had the luxury of having time to make an unhurried judgment, the chance for repeated reflection, and no *valid* competing obligations." Br. 36 (emphasis in the original). According to respondent, petitioner should have "wait[ed] until Martinez could give a free and voluntary statement after being advised of his constitutional rights protected by Miranda." *Ibid.* Because petitioner "had time to deliberate," he should be held to the standard of "deliberate indifference." *Ibid.*

That is a complete caricature of the interrogation in this case. When Chavez encountered respondent, he was gravely wounded, was in evident pain, and repeatedly told petitioner that he was about to die. Pet. App. 21a. Petitioner, unlike the officers in *Mincey* v. *Arizona*, 437 U.S. 385 (1978), did *not* have "the luxury" of time (Resp. Br. 36). He could *not* wait until later to secure Martinez's statement. Later might well have been too late; petitioner, too, believed that Martinez would die from his injuries. C.A. App. 38, 114, 452-453; J.A. 11-12, 20-22. So Chavez took ten minutes worth of statements over a 45-minute span (to permit emergency medical personnel to minister to respondent's wounds).

Circumstances like these – where an officer's decisions have to be made "'in haste, under pressure, and frequently without the luxury of a second chance'" (*County of Sacramento* v. *Lewis*, 523 U.S. at 853 (quoting *Whitley* v. *Albers*, 475 U.S. 312, 320 (1986))) – do not permit the degree of "deliberation" required for a "deliberate indifference" standard. Respondent was therefore required to plead and prove that petitioner impaired his liberty with an intent to harm him. He has not done so – and for that independent reason, his substantive due process claim must fail.

But there is yet another infirmity with respondent's Fourteenth Amendment claim: The court of appeals never considered *the reasons* for the interrogation in this case, and

therefore never weighed those reasons against the intrusiveness (if any) of Chavez's questioning. As this Court explained in *Cruzan* v. *Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990), "determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests."

The Ninth Circuit's failure to engage in any such balancing is a byproduct of its basic misconception about the relevant due process analysis. When it comes to the "fair trial" right under the Due Process Clause, there is nothing to balance: Persons have a right to a fair trial, free from the taint of coerced confessions, regardless of the government's competing goals; Al Capone gets the same fair trial that a jaywalker does. But when the government is *not* seeking to use an allegedly coerced statement against the witness – when the "fair trial" right is not involved – the due process inquiry must take account of the government's reasons for asking the questions in the first place.

Here, Chavez's reasons for interrogating Martinez were surpassingly important. Respondent was a key witness to an officer-involved shooting – the injured party himself – and seemingly he was about to die. Chavez was seeking to uncover the facts. Although respondent now asserts (Br. 10) that there is no evidence that "[p]etitioner was conducting an investigation into police misconduct," he admits (*ibid.*) that Chavez was seeking "to find the truth" and to determine "if [a] crime had been committed." C.A. App. 98-99; J.A. 20-22. And respondent does not dispute, nor could he, that these are reasons of substantial importance.

Yet the court of appeals never considered them. Believing as it did that a due process claim is stated whenever the government coerces a statement from a witness, the Ninth Circuit never asked *why* Ben Chavez spent ten minutes in the emergency room with Oliverio Martinez on November 28, 1997. Had it done so, it would have concluded that the urgent

need to secure respondent's statement outweighed any intrusiveness occasioned by the interrogation.[4]

3. Even If Respondent's Constitutional Rights *Were* Violated, Those Rights Were Not "Clearly Established" At The Time Of The Interrogation

Even if respondent could establish a Fifth or Fourteenth Amendment claim on these facts, he still would have to show that the constitutional right at stake was "clearly established" in the "particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (emphasis added). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

Respondent reads the law differently. According to respondent, "[t]he relevant inquiry" in determining whether qualified immunity is available "is whether Chavez acted reasonabl[y] given the circumstances he confronted." Br. 44. That is not the

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[4] Respondent suggests, in passing (Br. 11), that this due process issue is not properly before the Court because "[p]etitioner raised only a Fifth Amendment issue in the Petition." In fact, however, the third question presented in the petition read as follows: "Whether the Ninth Circuit panel correctly held that the conduct of this investigating officer was so offensive as to deny him qualified immunity." The answer to that question turns on "whether plaintiff's allegations, if true, establish a constitutional violation," and if so, whether that violation was "clearly established" at the time of the interrogation. *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). Here, the court of appeals answered the first question "yes" by deciding in respondent's favor *both* the Fifth and Fourteenth Amendment claims. Accordingly, to answer the qualified immunity question in this case, petitioner is constrained to show that the court of appeals erred on *both* constitutional issues.

correct standard. "Acting reasonably given the circumstances" is a pure negligence rule. By its nature, it permits a jury to second-guess an official's decision if it finds, in retrospect, that the officer should have acted differently.

The qualified immunity defense is designed to spare government officials just such second-guessing, as this Court emphasized in *Saucier*. The question in that case was whether a military police officer was entitled to qualified immunity in an action alleging excessive force in violation of the Fourth Amendment. The Court noted that an "objective reasonableness standard" applies to the question whether the officer's force was excessive. But "[t]he qualified immunity inquiry * * * has a further dimension." 533 U.S. at 205.

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Ibid. Unless the governing legal rules "put the officer on notice that his conduct would be *clearly unlawful*, summary judgment based on qualified immunity is appropriate." *Id.* at 202 (emphasis added).[5]

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[5] Recognizing that existing qualified immunity principles are unfavorable to respondent's claim, amicus curiae ATLA proposes that current law be jettisoned in favor of a standard that requires police officers to be "capable of making fine legal distinctions." Br. 15. Even in such a brave new world, however, petitioner would still be entitled to qualified immunity, in light of this Court's opinion in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), and the

Respondent does not even attempt to show that Chavez's interrogation in this case violated "clearly established" Fifth Amendment rights "in light of the specific context of the case." *Saucier*, 533 U.S. at 202. How could he? In *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), this Court stated that "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. * * * Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial."

Even if this statement is dictum (which we do not concede), surely it precludes a holding that the *opposite* proposition was "clearly established" – *i.e.*, that the Fifth Amendment can be violated by conduct that occurs only *before* trial. And the Ninth Circuit's previous decision in *Cooper* – in addition to being inconsistent with this Court's cases and the subject of withering criticism from other circuits – did not "clearly establish" that questioning like petitioner's would constitute a violation of the Fifth Amendment. As we explained in our opening brief (at 39 n.14), and as respondent makes no effort to dispute, the court of appeals in *Cooper* did not actually address the question whether the Fifth Amendment (as opposed to the Fourteenth Amendment) may be violated where no use is made of the compelled statement. Although the panel in this case read *Cooper* to have resolved this question, Chavez cannot be faulted because he failed to draw the same inference.[6]

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overwhelming weight of authority that was contrary to the Ninth Circuit's decision in *Cooper*.

[6] As we noted in our opening brief (at 40), the Ninth Circuit's understanding of the Fifth Amendment has been uniformly rejected by other circuits. Amicus Curiae Association of Trial Lawyers of America contends, however, that "[t]he law of other jurisdictions" should not control the question whether a proposition is "clearly established" if there is "authority on the particular question in the Supreme Court, local federal circuit or district court." Br. 19. Here, of course, there *is* "authority in the Supreme Court" – *Verdugo-Urquidez* – so ATLA's

Nor was it "clearly established" that an interrogation like the one conducted in this case would violate the Due Process Clause. The Ninth Circuit's contrary view rested on its belief that *Mincey* v. *Arizona*, 437 U.S. 385 (1978), had held "a virtually indistinguishable interrogation" to be unconstitutional. Pet. App. 12a-14a. But as we explained in our opening brief (at 45-49), with no rejoinder from respondent, *Mincey* sheds no relevant light on this case at all. First and foremost, *Mincey* was a "fair trial" case; the question there was whether Mincey's statements were involuntary and thus inadmissible at trial. 437 U.S. at 402. For the reasons stated here and in our opening brief, the "fair trial" cases do not control the quite different analysis that applies when an allegedly coerced statement is not being offered into evidence. What is more, the due process calculus in *Mincey* was far more favorable to a due process claim: Mincey was questioned over a four-hour period; he had to write down his answers because tubes had been inserted in his throat and nose, which made him unable to speak; and Mincey's "responses" were especially unreliable because they had been "reconstructed" after the fact by the interviewing officer. *Id.* at 396 & n.11, 398-399, 401. Conversely, there was no exigency to the questioning in *Mincey*; unlike petitioner –

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argument fails on its own terms. But ATLA's argument is conceptually flawed in any event. There is only one federal "law." To refer to the *case law* of *other circuits* as if it were "[t]he law of other jurisdictions," in the same manner in which different States' laws may be different, is confused. Circuit splits reflect not that the "law" is different in different circuits, but that jurists of reason differ at a particular time as to what the uniform federal law *is* – which strongly supports qualified immunity. The fact that there is only one body of federal law is why, when this Court disagrees with a decision of a circuit, "it is not accurate to say that this Court's decision * * * 'changed' the law that previously prevailed in the * * * Circuit." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994); see also *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993) (the fact that an Eighth Circuit precedent would have supported a habeas petitioner's argument at the time of his sentencing proceeding does not establish "prejudice" if that precedent was subsequently overruled).

who told Chavez repeatedly that he thought he was about to die – Mincey proposed to his interrogator that they suspend the questioning and "rap tomarrow [*sic*]." *Id.* at 400-401.

Courts should be especially reluctant to deny qualified immunity where the underlying constitutional right – here, the right (if any) to substantive due process – turns on a balancing of competing interests. As ATLA recognizes in its amicus brief, "where a constitutional right depends upon the balancing of interests, a public official cannot be expected to know in advance how those interests will be balanced, and therefore the right is not clearly established for the purpose of imposing liability." Br. 17. In the present case, moreover, petitioner would have needed remarkable intuition to anticipate that the balance might be struck against him, since a wide array of other circuits – on facts involving far less justification for police questioning, and often far more aggressive questioning – had *rejected* due process claims. See Pet. Br. 43-45. Again, respondent offers no answers.

* * *

Because respondent's statements were never used against him, he has no cognizable claim under either the Fifth Amendment or the "fair trial" protections of the Due Process Clause. And, although coercion alone may sometimes state a *substantive* due process claim, it cannot do so unless there is conduct that "shocks the conscience," is committed with an intent to harm, and impairs a liberty or property interest that outweighs the competing governmental purpose. None of these conditions, let alone all of them, has been shown here. In all events, neither a Fifth nor a Fourteenth Amendment right was "clearly established" at the time of the interrogation. To the contrary: Officer Chavez was doing a hard job under tragic and trying circumstances. He was entitled to qualified immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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